IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.100 OF 2001

Donald Gonsalves,
residing at Karachi, Pakistan,
through his duly constituted
attorney Jose Caetano Afonso,
resident of Penha de Franca,
Bardez, Goa ...PETITIONER

versus

Penha de Franca Youth
Club, Britona, Goa,
represented by its President
Shri Kusta Hari Bhonsle,
with Office at Britona,
Bardez, Goa ...RESPONDENT.

Shri M.B. D'Costa and Shri J. Lobo, Advocates for the Petitioner.

Shri V. Menezes,Advocate for the Respondent.

CORAM : F.I. REBELLO,J.

DATED : JANUARY 11, 2002.

ORAL JUDGMENT

Heard forthwith.

2. If the impugned Order is allowed to stand, in my opinion, justice will be a casualty. In the first instance, a suit was filed against unknown legal heirs of a person who was dead. The issue of cause of action in such a matter in the absence of any persons denying the right, character or title or interfering with the possession, may arise for consideration. Secondly, summons had to be issued

to persons and if the addresses are not known, then only, service could be effected by means of substituted service. Nothing has been shown in the Code of Civil Procedure by the learned Counsel for the Respondents to point out that the summons served was according to law and the procedure prescribed by the Code of Civil Procedure. Mere publication even if it be by substituted service, if it does not meet the requirements of service on a person, would not be service. Substituted service is only when the address of the person is not known or the person on whom it is to be servied is not found. It is not service to an unknown person.

3. In the instant case, the owners after coming to know of the ex parte decree, moved an application for setting aside of the said decree through their constituted attorney along with an application for condonation of delay. The defence raised by the Respondents herein is that the said person, who is now the attorney of the Petitioners, had full knowledge of the proceedings as he was a Member of the very Club, i.e. the Respondents. To my mind, this fact alone should have been sufficient for the Court to consider the inaction or inactivity of the said person in either communicating the fact to the plaintiffs or taking the steps to represent

the plaintiffs. The trial Court, however, seems to have found favour with the reply raised by the Respondents by holding that the cause shown was not sufficient cause.

4. In the instant case, it must be remembered that prima facie the suit itself, as filed, raised serious question as to whether it was maintainable. Secondly, the service admittedly was not service according to law and that by itself, should have been a ground for setting aside the ex parte decree forthwith irrespective of whether the Petitioners showed cause or no cause. In the instant case, on the material on record, in my opinion, the Petitioners had shown sufficient cause irrespective of some omissions here and there. The ends of justice and the power which is conferred on the Court under Section 151 to render justice could not have been sacrificed in this manner. To my mind, therefore, this Order deserves to be set aside and the plaintiff who claims as the heir of the late Carolina is entitled to defend the suit and the interest in the property.

5. For the aforesaid reasons, the Order dated 27-2-2001 is set aside. The Court is directed to proceed further with the matter bearing in mind what

has been observed by this Court in the earlier part of the Judgment, namely that the legal heirs should be given an opportunty to defend the suit.

(F.I. REBELLO)
JUDGE.

ac.